Madiahlagan a/l Sundaram v Lotuss Stores (M) Sdn Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO AA-16A-09 OF 2023
ABDUL WAHAB J
9 JANUARY 2025

Civil Procedure — Appeal — Appeal against decision of Industrial Court — Allegation of sexual harassment against appellant — Appellant's dismissal by company affirmed by Industrial Court — Whether absence of complainant to testify in court unjustified — Whether Industrial Court failed to decide that evidence tendered was hearsay and inadmissible — Whether Industrial Court erred in finding that appellant's dismissal was with just cause or excuse

The appellant was employed as a section manager with Tesco Stores (M) Sdn Bhd (as the respondent was then known, before its rebranding to Lotus Stores (M) Sdn Bhd in 2021). He held the position of store general manager stationed at the respondent's Kampar, Perak outlet. In or around March 2021, the respondent received reports alleging that the appellant had sent inappropriate WhatsApp messages to subordinate employees, a conduct that was deemed to amount to sexual harassment. Pending investigation, the appellant was suspended. Thereafter, the respondent scheduled an interview with the appellant whereby the appellant was required to present himself at Lotus Head Office to attend before Mr Richard Leonard, the Safety, Security and Resilience Director. During the interview, the appellant was presented with a series of WhatsApp messages which were alleged to be inappropriate. The appellant acknowledged that the mobile phone number associated with the messages was his and admitted that he sent all those messages. The respondent also conducted interviews with employees in subordinate positions who had received the inappropriate WhatsApp messages from the appellant, including one Nursufiah and Khairulnizam ('COW2'). The respondent's investigation concluded that the appellant had violated the company's Code of Practice on the Prevention and Handling of Sexual Harassment in the Workplace. In the circumstances, the respondent issued a show cause letter directing the appellant to address the allegations of sexual harassment. The appellant subsequently responded, however, upon reviewing the appellant's response, the respondent found it unsatisfactory and terminated the appellant's services. As the Industrial Court upheld the termination of the appellant's services, the appellant filed the present appeal on the grounds, inter alia, that: (a) the Industrial Court had failed to consider the fact that the complaints were not made by the complainant; and (b) Nursufiah's absence to testify in court was unjustified, as only she could verify the contents of the interview notes and authenticate her signature, given that she was the originator of the statement. The issues that arose for determination were: (i) whether the Industrial Court

was right when it decided that the sexual misconduct complained of by the respondent as the ground for dismissal was in fact committed by the appellant; (ii) whether the Industrial Court had failed to decide the evidence tendered was hearsay and was thus inadmissible; and (iii) whether the Industrial Court was right when it decided that such ground constituted just cause or excuse for the dismissal.

Held, dismissing the appeal:

(1) Even if the appellant contended that the WhatsApp messages were not intended to be sexual in nature but merely constituted playful banter among colleagues, this argument held little weight in the court's assessment. The content of the messages was indeed inappropriate, particularly given the appellant's position of authority over Nursufiah and COW2. The appellant's intentions were immaterial in this matter, as the relevant issue was the nature of the messages and the impact they had on the recipients (see para 21).

(2) The fact that Nursufiah and COW2 remained silent and responded to the WhatsApp messages did not mean that they acquiesced to it. Hence, the appellant's act of sending inappropriate and sexually explicit content via WhatsApp messages and graphics to Nursufiah and COW2 constituted sexual harassment. This conduct was not merely unwanted; it embodied a clear violation of the standards of decency expected in professional interactions. Such actions had profound consequences, creating an environment of discomfort and fear that was entirely unacceptable in the workplace (see paras 22–23).

(3) The appellant had admitted to sending the WhatsApp messages in question to Nursufiah and COW2. The messages, as evidenced by the screenshots provided, were clearly inappropriate and sexual in nature. Unlike cases of physical or verbal harassment, where intent and context may require deeper scrutiny, the electronic record here spoke for itself. The nature of the communication was unequivocal, and the appellant's assertion that the messages were merely friendly interactions between a superior and his subordinates was irrelevant. The objective content of the messages and their impact on the recipients were what the court considered decisive in determining whether they amount to sexual harassment (see para 36).

(4) The fact that Nursufiah did not testify in court did not, in any way, result in unfairness or prejudice to the appellant. Given that the appellant had already admitted to sending the WhatsApp messages, and the content of those messages was corroborated by clear documentary evidence, the absence of Nursufiah's testimony did not diminish the reliability of the evidence presented. The core issue in this case lay in the nature of the

messages themselves, not in any factual dispute that would necessitate further testimonial clarification (see para 37).

(5) Sexual harassment did not only create a hostile and unsafe working environment, but it also undermined the trust between employer and employee. Additionally, sexual harassment was a breach of an employee's contractual and fiduciary obligations, as outlined in the company's code of Practice on the Prevention and Handling of Sexual Harassment in the Workplace. Employers were not only justified in dismissing employees who engage in such conduct but were legally obligated to do so to prevent further harm to other employees and to protect the company from potential liability. The Industrial Court had meticulously evaluated the evidence presented and arrived at conclusions that were both reasonable and justified. The dismissal of the appellant was with just cause and excuse. There was no ground for appellate intervention on the findings made by the Industrial Court (see paras 40, 42 & 47–48).

[Bahasa Malaysia summary

Perayu telah berkhidmat sebagai pengurus seksyen dengan Tesco Stores (M) Sdn Bhd (sebagaimana responden dikenali pada ketika itu, sebelum penjenamaan semula kepada Lotus Stores (M) Sdn Bhd pada tahun 2021). Beliau memegang jawatan sebagai pengurus besar kedai yang ditempatkan di cawangan responden di Kampar, Perak. Pada atau sekitar bulan Mac 2021, responden telah menerima laporan yang mendakwa bahawa perayu telah menghantar mesej-mesej WhatsApp yang tidak wajar kepada pekerja-pekerja bawahan, satu kelakuan yang dianggap sebagai gangguan seksual. Sementara menunggu siasatan, perayu telah digantung tugas. Selepas itu, responden telah menjadualkan satu temuduga dengan perayu di mana perayu dikehendaki hadir ke Ibu Pejabat Lotus untuk menghadiri di hadapan En Richard Leonard, Pengarah Keselamatan, Sekuriti dan Ketahanan. Semasa temuduga tersebut, perayu telah dikemukakan dengan beberapa mesej WhatsApp yang didakwa tidak wajar. Perayu telah mengakui bahawa nombor telefon bimbit yang berkaitan dengan mesej-mesej tersebut adalah miliknya dan mengakui bahawa beliau telah menghantar kesemua mesej tersebut. Responden juga telah menjalankan temuduga dengan pekerja-pekerja bawahan yang telah menerima mesej-mesej WhatsApp yang tidak wajar daripada perayu, termasuk seorang bernama Nursufiah dan Khairulnizam ('COW2'). Siasatan responden menyimpulkan bahawa perayu telah melanggar Kod Amalan Syarikat mengenai Pencegahan dan Pengendalian Gangguan Seksual di Tempat Kerja. Dalam keadaan tersebut, responden telah mengeluarkan surat tunjuk sebab yang mengarahkan perayu menjawab tuduhan gangguan seksual. Perayu kemudiannya telah memberikan jawapan, namun setelah meneliti jawapan tersebut, responden mendapati ia tidak memadai dan telah menamatkan perkhidmatan perayu. Oleh kerana Mahkamah Perusahaan telah mengekalkan penamatan perkhidmatan perayu, perayu telah memfailkan rayuan ini atas

alasan, antara lain, bahawa: (a) Mahkamah Perusahaan telah gagal mempertimbangkan fakta bahawa aduan tidak dibuat oleh pengadu; dan (b) ketiadaan Nursufiah untuk memberi keterangan di mahkamah adalah tidak berasas, kerana hanya beliau boleh mengesahkan kandungan nota temuduga dan mengesahkan tandatangannya, memandangkan beliau adalah pengeluar kenyataan tersebut. Isu-isu yang timbul untuk diputuskan adalah: (i) sama ada Mahkamah Perusahaan adalah betul apabila ia memutuskan bahawa salah laku seksual yang diadukan oleh responden sebagai alasan penamatan perkhidmatan sebenarnya telah dilakukan oleh perayu; (ii) sama ada Mahkamah Perusahaan telah gagal memutuskan bahawa keterangan yang dikemukakan adalah dengar cakap dan oleh itu tidak boleh diterima; dan (iii) sama ada Mahkamah Perusahaan adalah betul apabila ia memutuskan bahawa alasan sedemikian merupakan sebab atau alasan yang adil bagi penamatan perkhidmatan.

Diputuskan, menolak rayuan:

(1) Walaupun perayu berhujah bahawa mesej-mesej WhatsApp tersebut tidak bertujuan bersifat seksual tetapi hanyalah gurauan antara rakan sekerja, hujahan ini tidak mempunyai kekuatan dalam penilaian mahkamah. Kandungan mesej tersebut sememangnya tidak wajar, lebih-lebih lagi memandangkan kedudukan perayu yang mempunyai kuasa terhadap Nursufiah dan COW2. Niat perayu adalah tidak relevan dalam perkara ini, kerana isu yang berbangkit adalah sifat mesej tersebut dan kesan terhadap penerima (lihat perenggan 21).

(2) Fakta bahawa Nursufiah dan COW2 berdiam diri dan membalas mesej-mesej WhatsApp tidak bermaksud mereka bersetuju dengannya. Oleh itu, perbuatan perayu menghantar kandungan yang tidak wajar dan berunsur seksual melalui mesej WhatsApp dan grafik kepada Nursufiah dan COW2 adalah merupakan gangguan seksual. Kelakuan ini bukan sahaja tidak dikehendaki, malah merupakan pelanggaran nyata terhadap piawaian kesopanan yang dijangka dalam interaksi profesional. Tindakan sedemikian membawa kesan serius, mewujudkan suasana tidak selesa dan ketakutan yang sama sekali tidak boleh diterima di tempat kerja (lihat perenggan 22–23).

(3) Perayu telah mengakui bahawa beliau menghantar mesej-mesej WhatsApp yang dipersoalkan kepada Nursufiah dan COW2. Mesej-mesej tersebut, sebagaimana dibuktikan melalui tangkapan skrin, jelas bersifat tidak wajar dan berunsur seksual. Tidak seperti kes gangguan fizikal atau lisan di mana niat dan konteks mungkin memerlukan penelitian lanjut, rekod elektronik di sini berbicara dengan sendiri. Sifat komunikasi tersebut adalah jelas, dan dakwaan perayu bahawa mesej-mesej itu hanyalah interaksi mesra antara seorang ketua dengan pekerja bawahan adalah tidak relevan. Kandungan objektif mesej

tersebut dan kesannya terhadap penerima adalah perkara yang dianggap muktamad oleh mahkamah dalam menentukan sama ada ia merupakan gangguan seksual (lihat perenggan 36).

(4) Fakta bahawa Nursufiah tidak memberi keterangan di mahkamah tidak, dalam apa jua cara, membawa kepada ketidakadilan atau prejudis terhadap perayu. Memandangkan perayu telah pun mengakui menghantar mesej-mesej WhatsApp tersebut, dan kandungan mesej-mesej tersebut telah disokong oleh keterangan dokumentari yang jelas, ketiadaan keterangan Nursufiah tidak mengurangkan kebolehpercayaan keterangan yang dikemukakan. Isu utama dalam kes ini terletak pada sifat mesej-mesej itu sendiri, bukannya pertikaian fakta yang memerlukan pengesahan saksi lanjut (lihat perenggan 37).

(5) Gangguan seksual bukan sahaja mewujudkan suasana kerja yang bermusuhan dan tidak selamat, malah ia turut merosakkan kepercayaan antara majikan dan pekerja. Selain itu, gangguan seksual adalah pelanggaran terhadap obligasi kontraktual dan fidusiari seorang pekerja, sebagaimana digariskan dalam Kod Amalan syarikat mengenai Pencegahan dan Pengendalian Gangguan Seksual di Tempat Kerja. Majikan bukan sahaja berhak menamatkan perkhidmatan pekerja yang terlibat dalam kelakuan sedemikian malah berkewajipan undang-undang untuk berbuat demikian bagi mengelakkan mudarat lanjut kepada pekerja lain dan melindungi syarikat daripada liabiliti yang berpotensi. Mahkamah Perusahaan telah menilai dengan teliti keterangan yang dikemukakan dan mencapai kesimpulan yang wajar dan berasas. Penamatan perkhidmatan perayu adalah dengan sebab dan alasan yang adil. Tiada asas untuk campur tangan peringkat rayuan terhadap dapatan yang dibuat oleh Mahkamah Perusahaan (lihat perenggan 40, 42 & 47–48).]

Cases referred to

Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1996] 2 MLRA 286; [1996] 2 MLRA 212; [1997] 1 CLJ 665; [1996] 3 AMR 3181, CA (refd)

Ketheeswaran a/l Kanagaratnam & Anor v PP [2024] 1 MLJ 851; [2024] 2 MLRA 288, FC (refd)

Md Nor bin Kassim v Malayan Banking Bhd [2017] MLJU 656; [2017] 1 LNS 506, CA (refd)

Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282; [2016] 4 MLRA 614; [2016] 6 CLJ 346; [2016] 4 AMR 256, FC (refd)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)

Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 1 MELR 4, CA (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753; [1995] 1 MLRA 412; [1995] 3 CLJ 344; [1995] 2 AMR 2145, FC (refd)

Legislation referred to

Employment Act 1955 s 2
Evidence Act 1950 ss 32, 32(1)(i), 114(g), 158

Ayleswary a/p Bathamanathan (Ayleswary) for the appellant.
Vijayan Venugopal (with Peter H Santiago) (Shearn Delamore & Co) for the respondent.

Abdul Wahab J:

INTRODUCTION

[1] This is an appeal against the Industrial Court's Award No 1923 of 2023 ('the award') in the Industrial Court Case No 10/4–441/22 between Madiahlagan a/l Sundaram ('the appellant') and Lotus Stores (M) Sdn Bhd ('the respondent'). The learned Industrial Court chairman, Tuan Zulhelmy bin Hasan handed down the award dated 13 September 2023 which decided that the appellant was dismissed with just cause and excuse.

SALIENT FACTS

[2] The dispute in this case is over the unlawful dismissal of the appellant without just cause and excuse. The appellant was employed on 6 September 2004 as a section manager with Tesco Stores (M) Sdn Bhd (as the respondent was then known, before its rebranding to Lotus Stores (M) Sdn Bhd in 2021). He held the position of store general manager stationed at the respondent's Kampar, Perak outlet.

[3] In or around March 2021, the respondent received reports alleging that the appellant had sent inappropriate Whatsapp messages to subordinate employees, conduct that was deemed to amount to sexual harassment. Pending an investigation, the appellant was suspended on half pay effective from 31 March 2021 to 13 April 2021, as communicated in a letter dated 30 March 2021. The suspension was subsequently extended by letter of extension dated 13 April 2021. As part of the investigation, the respondent conducted an interview with the appellant on 30 March 2021.

[4] The respondent scheduled an interview with the appellant on 30 March 2021 whereby the appellant was required to present himself at Lotus Head

Office at Kepong, Kuala Lumpur to attend before Mr Richard Leonard, the Safety, Security and Resilience Director. During the interview, the appellant was presented with a series of Whatsapp messages which were alleged to be inappropriate. The appellant acknowledged that the mobile phone number associated with the messages was his and admitted that he sent all those messages. The appellant was then provided with a copy of the interview transcript dated 30 March 2021 to which he signed the same to confirm the factual accuracy of the contents.

[5] The respondent also conducted interviews with employees in subordinate positions who had received the inappropriate WhatsApp messages from the appellant, including one Nursufiah Sani bt Harunarrashit ('Nursufiah'), a former apparel associate, and Khairulnizam bin Md Hashim ('COW2'). The respondent's investigation concluded that the appellant had violated the company's code of practice on the prevention and handling of sexual harassment in the workplace.

[6] In light of the above, the respondent issued a show cause letter dated 8 April 2021, directing the appellant to address the allegations of sexual harassment. The appellant subsequently responded through a reply dated 15 April 2021. Upon reviewing the appellant's response, the respondent found it unsatisfactory and determined that the issuance of the inappropriate WhatsApp messages constituted serious misconduct based on several grounds:

(a) the messages amounted to sexual harassment, a serious violation of the respondent's rules and regulations;

(b) as senior general manager, the appellant held a high-ranking position and was expected to exemplify integrity, efficiency, and effectiveness in protecting the respondent's interests;

(c) the appellant was required to demonstrate leadership and lead by example, but through his misconduct, as detailed in the show cause letter, he failed to meet these standards;

(d) in his superior role, the appellant was obligated to protect and safeguard the interests of his subordinates, yet instead caused discomfort and fear among them through the issuance of the WhatsApp messages; and

(e) the respondent could no longer place the requisite trust and confidence in the appellant to execute his duties with full integrity and honesty.

[7] Based on the above, the respondent terminated the appellant's services with immediate effect vide a letter dated 26 April 2021. Vide the award dated 13 September 2023, the Industrial Court upheld the termination of the appellant's services.

[8] The appellant contends that the non-attendance of Nursufiah is unjustified. He asserts that only a single letter was sent to her, which was delivered, yet the respondent failed to issue a second letter notifying her of the hearing date. Furthermore, no subpoena was filed to compel her attendance. The appellant also challenges the genuineness, authenticity, and originality of Nursufiah's interview notes, maintaining that only Nursufiah can confirm the accuracy of the contents and verify the signature appearing on the document.

[9] The appellant asserts that the Industrial Court failed to take into accounts the fact that the complaints were not lodged by the purported victims themselves. Instead, the complaints were submitted by an unidentified individual. Additionally, there was a significant delay in the filing of the complaints, with Nursufiah's alleged complaint being lodged 1 1/2 months after the incident, and COW2's complaint being made after a period of three months.

[10] The appellant contends that the Industrial Court failed to properly assess the evidence of Ang Hooi Har, the area business partner of the northern region of the company who attended to testify during the Industrial Court proceeding ('COWS1'), which constituted hearsay and, therefore, was inadmissible. COWS1 merely reiterated the allegations recorded in Nursufiah's interview notes, and her testimony was not corroborated by any additional evidence. The appellant further argues that the Industrial Court erred in not invoking s 114(g) of the Evidence Act 1950 in relation to the respondent's failure to produce Nursufiah and Richard Leonard as witnesses.

THE RESPONDENT'S CLAIM

[11] The respondent submits that the Industrial Court did not erred in law in concluding that the appellant was guilty of the misconduct of sexual harassment. The respondent further argues that it is not necessary for Nursufiah to testify in court to confirm that the WhatsApp messages she received from the appellant were sexual in nature.

[12] The respondent further submits that the fact that Nursufiah and COW2 did not explicitly object to the messages does not imply that they acquiesced to the appellant's conduct in sending inappropriate personal messages. The appellant's intentions in sending the messages are irrelevant to the matter at hand.

[13] The respondent concurs with the Industrial Court's finding that the dismissal of the appellant is with just cause and excuse. The respondent emphasises that the appellant held a superior position to both Nursufiah and COW2, occupying a managerial or supervisory role. It is immaterial that the

appellant does not have direct authority to terminate their employment, as there is an inherent imbalance in bargaining power between the parties.

ISSUES TO BE CONSIDERED

[14] The issues for the court's consideration are as follows:

(a) whether the Industrial Court was right when decided that the sexual misconduct complained of by the company as the ground for dismissal was in fact committed by the appellant;

(b) whether the Industrial Court had failed to decide the evidence tendered was hearsay evidence and thus inadmissible; and

(c) whether the Industrial Court was right when decided that such ground constitutes just cause or excuse for the dismissal.

COURT'S FINDINGS

Issue 1: Whether Industrial Court was right when decided that the sexual misconduct complained of by the company as the ground for dismissal was in fact committed by the appellant?

Elements that constitutes as sexual harassment in workplace

[15] In addressing the issue of sexual harassment, the court recognises that it can often be subjective in nature, as there is no universally definitive criterion for what constitutes such misconduct. Acts that may seem benign to one individual, such as a congratulatory pat on the back or a light-hearted comment about a colleague's appearance, could be perceived by another as unwelcome or inappropriate, potentially giving rise to discomfort and leading to a formal complaint of harassment. Therefore, it is crucial for the court to carefully examine the context in which the conduct occurred, as well as the perception of the alleged victim, in order to determine whether the actions in question amount to sexual harassment. In deciding this issue, the court must first establish what constitutes as sexual harassment under the applicable legal framework. In Malaysia, the Employment Act 1955 provide guidance on identifying conduct that qualifies as sexual harassment. Section 2 of the Employment Act 1955 reads as follows:

> Sexual harassment means any unwanted conduct of a sexual nature, whether verbal, non-verbal, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.

[16] Prior to the aforesaid amendment, there were no statutory provisions on sexual harassment in Malaysia. The only available reference pertaining to sexual

harassment was the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace which was formulated and issued by the Ministry of Human Resources in September 1999 ('the Code of Practice'). According to the Code of Practice, sexual harassment means:

> Any unwanted conduct of sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:
>
> i) That might on reasonable grounds be perceived by the recipient as placing a condition of sexual nature on his/her employment; or
>
> ii) That might on reasonable grounds be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being, but has no direct link to her/his employment.

[17] Notwithstanding the Code of Practice has no force of law, our courts have referred and adopted the provisions of the Code of Practice in deciding cases involving sexual harassment. In *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2014] MLJU 1872; [2015] 4 CLJ 295, the Court of Appeal judge, Zaharah Ibrahim JCA quoted and adopted the definition of sexual harassment from the Code of Practice. Similarly, in *Md Nor bin Kassim v Malayan Banking Bhd* [2017] MLJU 656; [2017] 1 LNS 506, the learned judge, Umi Kalthum Abdul Majid JCA adopted with approval the definition of sexual harassment provided by the Code of Practice.

[18] Looking at the phrases used in the Act such as 'unwanted', 'sexual nature', 'offensive', 'humiliating', 'threat', this court believes that there is a significant amount of ambiguity that is open to interpretation on the part of employers, employees and the courts. Interpretation of the above terms may vary drastically from person to person. Everyone has different perception about 'unwanted conduct of sexual nature' due to the different level of tolerance for physical contact of any type. In fact, because a person's individual sensitivities and need for personal space varies so widely, inappropriate touching — from a happy slap on the back to a welcoming kiss on the cheek to an angry pointed finger in someone's chest — are all the subject of complaints to management.

[19] The question now is, can a specific conduct amount to sexual harassment depending on the recipient? The Act clearly states that the 'unwanted conduct of sexual nature' must 'arise out of and in the course of his employment'. The implication here is that conduct of a sexual nature regardless how inappropriate it may be, may not amount to sexual harassment if the recipient consented to it. Further, cases in Malaysia have shown that sexual harassment is proved when the submission to or rejection of such conduct by an individual is used by the employer as a basis for employment decisions. It is also a form of sexual harassment when such conduct interferes with an

employee's work performance, or it creates an intimidating or hostile environment for the employee and/or other employees.

[20] This court is aware that there are times when employer often considers humour or being friendly and joyful as a way to bond with their subordinates but this court would like to highlight the dangers of crossing the line when it comes to sexual jokes in the workplace. What may seem to be playful banter could easily become a source of discomfort for employees, leading to claims of sexual harassment. As such, it is crucial for employers to be mindful of their words and behaviour by maintaining professionalism at all times to prevent serious repercussions. It must be noted that even well-intentioned humour and light-hearted attitude such as making sexual jokes or casual comments could create an unhealthy work environment and potentially be classified as harassment especially if employees are uncomfortable or affected by such behaviour.

[21] In light of the foregoing reasoning, in this present case, even if the appellant contends that the WhatsApp messages were not intended to be sexual in nature but merely constituted playful banter among colleagues, this argument holds little weight in the court's assessment. Upon reviewing the content of the messages, the court finds that they were indeed inappropriate, particularly given the appellant's position of authority over Nursufiah and COW2. The court is of the firm view that the appellant's intentions are immaterial in this matter, as the relevant issue is the nature of the messages and the impact they had on the recipients.

The victim's silence does not constitute acquiescence

[22] The appellant also contends that the Industrial Court had failed to consider the fact that the complaints were not made by the complainant. The alleged 'victims' did not lodge complaint and was made by 'unknown'. There was also a delay in making the complaint. Nursufiah's alleged complaint was lodged after 1 1/2 months and COW2's alleged complaint was made after three months. This court is of the opinion that the fact that Nursufiah and COW2 remain silent and responded to the Whatsapp messages do not mean that they acquiesced to it. Ashgar Ali in his book *Dismissal from Employment and the Remedies* (Lexis Nexis, 2007) stated that:

> It has also to be borne in mind that many cases of sexual harassment may go unreported with the victim suffering in silence, in view of the social stigma and fears that the complainant may not be believed or takes seriously, and also the fear of reprisal, ie, repercussions. Sometimes there is also a delay in reporting, as in cases where the complainant only plucks up the courage to come forward and report after seeing another colleague filing such complaint.

[23] In the present case, this court is satisfied with the findings of the Industrial Court which concluded that the appellant's act of sending inappropriate and sexually explicit content via WhatsApp messages and graphics to Nursufiah and COW2 constitutes sexual harassment. This conduct is not merely unwanted; it embodies a clear violation of the standards of decency expected in professional interactions. Such actions have profound consequences, creating an environment of discomfort and fear that is entirely unacceptable in the workplace. By recognising the detrimental effects of this behaviour, the court underscores the importance of maintaining a safe and respectful work environment for all employees.

Issue 2: Whether the Industrial Court had failed to decide the evidence tendered is hearsay evidence and thus inadmissible

[24] In the present case, it is noteworthy that three individuals Nursufiah, COWS1, and Richard Leonard attended the interview conducted by the respondent. However, only COWS1 was present in court to provide testimony. Furthermore, no evidence or documentation was submitted to establish that the answers and signature in the interview notes belonged to Nursufiah. COWS1 merely reiterated the allegations contained in Nursufiah's interview notes, rendering his testimony hearsay and thus inadmissible.

[25] Additionally, Nursufiah did not appear to testify before the Industrial Court. The appellant argues that Nursufiah's absence is unjustified, as only she can verify the contents of the interview notes and authenticate her signature, given that she is the originator of the statement. The appellant asserts that the respondent made insufficient efforts to secure her attendance, noting that only a single letter was sent to her. Moreover, the appellant contends that the Industrial Court failed to invoke s 114(g) of the Evidence Act 1950 regarding the absence of Nursufiah and Richard Leonard, which could have implications for the assessment of the evidence presented.

[26] It is well-established law that hearsay evidence is generally inadmissible. However, exceptions to this rule have been recognised on the grounds of necessity or convenience. Section 32 outlines longstanding exceptions to the hearsay rule, permitting the admission of specific types of evidence when certain conditions are met. Section 32 of the Evidence Act 1950 reads as follows:

> Section 32: Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of

delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

(c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

(d) when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which if it existed he would have been likely to be aware, and when the statement was made before any controversy as to the right, custom or matter had arisen;

(e) *when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;*

(f) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when the statement was made before the question in dispute was raised;

(g) when the statement is contained in any document which relates to any transaction as is mentioned in section 13(a);

(h) when the statement was made by a number of persons and expressed feelings or impressions on their part relevant to the matter in question;

(i) when the statement was made in the course of, or for the purposes

of, an investigation or inquiry into an offence under or by virtue of any written law; and

(j) where the statement was made by a public officer in the discharge of his duties.

In light of the facts of this case, this court believes that it falls within the scope of s 32(1)(i) of the Evidence Act 1950.

[27] One of the largest aversions to hearsay is that its credibility cannot be established as the veracity of that information cannot be cross-examined. In this regard, s 158 of the Evidence Act 1950 which stipulates the rule applicable when such evidence cannot be cross-examined because it was adduced under s 32, states thus:

> 158 What matters may be proved in connection with proved statement relevant under ss 32 or 33
>
> Whenever any statement relevant under ss 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

[28] While cross-examination is a fundamental component of a fair trial, its exclusion does not automatically equate to a violation of the accused's rights. Regarding to hearsay evidence, there are circumstances under which the ability to cross-examine may be limited in order to balance the rights of the accused with those of vulnerable victims and societal interests. This is especially pertinent when considering the complexities involved in the testimony of vulnerable individuals, such as children or persons with disabilities. The Federal Court case of *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor* [2024] 1 MLJ 851; [2024] 2 MLRA 288 further elucidates this principle, emphasising that the court must assess the fairness of a trial in its entirety rather than focusing solely on the absence of specific procedural elements. Tengku Maimun Tuan Mat CJ, Mohamad Zabidin Mohd Diah CJM, Harminder Singh Dhaliwal, Abu Bakar Jais, Abdul Karim Abdul Jalil FCJJ in this case stated that:

> [119] The position above is not unique to only hearsay evidence in that evidence that cannot be cross-examined, is admissible in court. In many other jurisdictions, it is also being recognised that while cross-examination is a very important aspect of a criminal trial, in light of the need to triangulate rights (balancing the rights of the accused with that of the victim and the society), there might be instances where the ability to cross-examine has to be limited. Examples include the examination of vulnerable victims such as children and disabled persons. While in those cases

> cross-examination may not be completely excluded, the court has powers to limit the types of questions that can be asked.
>
> ...
>
> [122] In assessing whether the right to a fair trial has been curtailed, the court cannot be too focused on piecemeal arguments that allege that a trial is unfair because certain features in a trial are missing as compared to other ordinary trials. In other words, the court cannot lose the forest for the trees. The ultimate question is whether the exclusion of a procedural right has overridden the 'equality of arms' between the prosecution and the accused, and whether the trial as a whole has been unfair, resulting in a miscarriage of justice to the accused. The mere fact of the absence of cross-examination without any attendant indication of any miscarriage of justice or that the right to defend oneself has been jeopardised in any material way, is in our view, insufficient to lead to the conclusion that the accused's right to a fair trial has been violated.

[29] The judges in this case highlighted the necessity of evaluating whether the exclusion of a procedural right, such as cross-examination, has disrupted the 'equality of arms' between the prosecution and the defence, ultimately affecting the fairness of the trial. In instances where there is no demonstrable indication of a miscarriage of justice or significant impairment of the right to self-defence, the mere lack of cross-examination does not suffice to establish a violation of the accused's right to a fair trial. Thus, it is clear that the legal framework recognises the need for flexibility in procedural rights, ensuring that the administration of justice remains balanced and equitable while still upholding the integrity of the trial process.

[30] Apart from that, in our present case, the appellant also ventilated that corroboration is required as COWS1 stipulation is merely a hearsay evidence. With regards to this, this court refers to the case of *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282; [2016] 4 MLRA 614; [2016] 6 CLJ 346; [2016] 4 AMR 256 where it was held (vide the judgment of Suriyadi Halim Omar FCJ):

> The appellant ventilated that corroboration is required, 'as a matter of practice for evidence of complainant in sexual cases and by accomplices in cases of sexual harassment (para 93 of the appellant's written submission)'. As the appellant has made mention of the need of corroboration we will now discuss whether corroboration is a legal requirement. We start by stating the obvious ie, the standard of proof in civil cases has traditionally been on a balance of probabilities, a standard that is certainly lower than that of criminal cases; nowhere near that of proving a case beyond reasonable doubt.
>
> To allay any fear, we are constantly wary and alert of vindictive complaints and the debilitating effect such complaints has on a person, the family and the alleged perpetrator's social standing once they are made. Even *Ashgar Ali Ali Mohamed, Muzaffar Syah Mallow and Farheen Baig Sardar Baig in Sexual Harassment at*

Workplace in Malaysia did highlight the need for corroborative evidence in order to establish such tort. Regretfully, the writer somehow has missed the point that a harassed person, say a lady, does not file a complaint for the pleasure of it. By filing a complaint she equally suffers potential censure. An unsuccessful complaint, or eliciting disbelief by her employer, will inevitably expose her to public ostracisation, and may create great anxiety and discomfort at the workplace for her.

To demand corroboration, just because there exists some sexual favour in the complaint will cause the harassed person to be, more often than not helpless, as most of the evidence will consist of the words of the harasser vis-a-vis the victim. And much of such leery harassment invariably takes place in private (*FH v McDougall* [2008] SCC 53).

In our judicial system much deference is given to the ability of judges to scrutinise carefully the evidence before them and eventually arrive at a factual finding, but subject to the long-standing rule of the litigant establishing his case on the standard of balance of probabilities. The learned judge who is in an advantageous position, and has the audiovisual superiority, will be arriving at a decision based on the facts adduced before him. In short, there is no hard and fast rule that in a tort of sexual harassment case there must be corroboration, though like in any civil case the rule of evidence must be stringently upheld.

[31] In light of the authorities, this court believes that it is evident that while corroborative evidence can enhance the credibility of sexual harassment claims, it is not an absolute requirement for establishing such torts. The unique and often private nature of these incidents presents significant challenges for victims, who may fear public ostracism or professional repercussions when coming forward. The judicial system, recognising these complexities, places substantial trust in judges to evaluate the evidence presented and make informed determinations based on the balance of probabilities.

[32] This court is of the opinion that the need for corroborative evidence in sexual harassment cases must be approached with sensitivity to the victim's circumstances. Filing a complaint is not a trivial matter; it often subjects the complainant, particularly women, to scrutiny and potential backlash, as they navigate a workplace culture that may still harbour biases against such claims. For instance, in cases where harassment occurs in private settings, such as the workplace, the only evidence may be the conflicting testimonies of the victim and the alleged harasser. This context illustrates the inherent difficulty in securing corroborative evidence, as much of the interaction transpires away from witnesses.

[33] Hence, placing an undue burden of corroboration on the victim could render them effectively powerless in seeking justice. The judicial approach, therefore, should be rooted in a balanced assessment of evidence, allowing judges to draw reasonable conclusions based on the testimonies presented. Ultimately, while the principles of evidence remain critical, they must be

applied flexibly in sexual harassment cases to ensure that victims are not further victimised by the very system designed to protect them. This balance between evidentiary standards and the realities faced by victims is crucial for fostering a just and equitable workplace environment.

[34] Apart from that, this court is also of the opinion that the standard of proof in sexual harassment cases, especially within the workplace, aligns with the civil standard of a balance of probabilities. This requires that the evidence presented by the complainant must show that it is more likely than not that the harassment occurred. Unlike criminal cases where the threshold is 'beyond reasonable doubt', the lower standard of proof in civil matters reflects the principle that workplace disputes, including sexual harassment claims, are primarily adjudicated to protect the integrity and safety of the working environment. The Court of Appeal in the case of *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 1 MELR 4 had laid down the principle that the standard of proof is on the balance of probabilities wherein Abdul Hamid Mohamad JCA opined:

> Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including 'theft', is not required to be satisfied beyond reasonable doubt that the employee has 'committed the offence', as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as 'solid and sensible grounds', 'sufficient to measure up to a preponderance of the evidence', 'whether a case ... has been made out', 'on the balance of probabilities' and 'evidence of probative value'. In our view the passage quoted from *Administrative Law* by HWR Wade & CF Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not 'passwords' that the failure to use them or if some other words are used, the decision is automatically rendered bad in law.

[35] Hence, this court believes that the present case must be clearly distinguished from other reported cases of sexual harassment. In cases involving physical harassment, such as inappropriate touching or physical contact, or verbal harassment, including the use of vulgar or offensive language, this court believes that a higher standard of proof would be required. This is because such cases often necessitate direct testimony from the victim and witnesses, who must be subjected to cross-examination to ensure that no prejudice or unfairness is caused to either party. The evidentiary burden in those circumstances is significant, given the potential for misinterpretation or ambiguity in verbal or physical interactions.

[36] In the present case however, the appellant has admitted to sending the WhatsApp messages in question to Nursufiah and COW2. The messages, as

evidenced by the screenshots provided, are clearly inappropriate and sexual in nature. Unlike cases of physical or verbal harassment, where intent and context may require deeper scrutiny, the electronic record here speaks for itself. The court finds that the nature of the communication is unequivocal, and the appellant's assertion that the messages were merely friendly interactions between a superior and his subordinates is irrelevant. The objective content of the messages and their impact on the recipients are what the court considers decisive in determining whether they amount to sexual harassment.

[37] Hence, the fact that Nursufiah did not testify in court does not, in any way, result in unfairness or prejudice to the appellant. Given that the appellant has already admitted to sending the WhatsApp messages, and the content of those messages is corroborated by clear documentary evidence, the absence of Nursufiah's testimony does not diminish the reliability of the evidence presented. The core issue in this case lies in the nature of the messages themselves, not in any factual dispute that would necessitate further testimonial clarification.

Issue 3: Whether Industrial Court was right when decided that such ground constitute just cause or excuse for the dismissal?

[38] The appellant contended that the Industrial Court was wrong in arriving to the decision as domestic inquiry was not conducted by the respondent. This court would like to make a reference to a decisive judgment delivered by the Federal Court, His Lordship Mohd Azmi (FCJ) speaking on behalf of the court held in the case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753; [1995] 1 MLRA 412; [1995] 3 CLJ 344; [1995] 2 AMR 2145 stated that:

> Even if there had been procedural flaws in the DI proceeding, that in itself does not invalidate the proceeding. It was held that: the Industrial Court was not competent to declare the dismissal void for failure to comply with the rules of natural justice. The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry. We were confident that the Industrial Court as constituted at present was capable of arriving at a fair result by fair means on all matters referred to it. If therefore there had been a procedural breach of natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the rehearing by the Industrial Court.

[39] In addition, the Court of Appeal in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1996] 2 MLRA 286; [1996] 2 MLRA 212; [1997] 1 CLJ 665; [1996] 3 AMR 3181 observed that:

> The fact that an employer has conducted a domestic inquiry against his workman is, in my judgment, an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. The findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. However, it may take into accounts the fact that a domestic inquiry had been held when determining whether the particular workman was justly dismissed.

[40] Now, the next crucial question is whether the proven misconduct constitutes just cause or excuse for the dismissal? In deciding this issue, this court is of the opinion that any inappropriate conduct particularly sexual harassment within the workplace is an egregious violation of both legal and ethical standards. Sexual harassment does not only create a hostile and unsafe working environment, but it also undermines the trust between employer and employee, which is crucial to the effective functioning of any organization. Given the serious nature of such misconduct, it is imperative that employers take swift and decisive action against perpetrators to maintain workplace integrity. The dismissal of an employee proven guilty of sexual harassment is not only reasonable but necessary to uphold the company's duty to protect its workforce and ensure a safe and respectful environment for all.

[41] In Malaysia, the courts have recognised the gravity of sexual harassment in the workplace, holding that such conduct justifies dismissal when proven. A notable example that emphasises the seriousness of sexual harassment in the workplace is the Federal Court decision in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282; [2016] 4 MLRA 614; [2016] 6 CLJ 346; [2016] 4 AMR 256 where the Federal Court affirmed that sexual harassment is not to be taken lightly and must be dealt with firmly. The court highlighted that sexual harassment involves an abuse of power, particularly when the perpetrator holds a position of authority over the victim, further aggravating the offense. In such cases, dismissal serves as an appropriate sanction, reflecting both the severity of the misconduct and the employer's commitment to upholding workplace safety. This case reinforces the principle that, in the Malaysian judicial system, sexual harassment in the workplace is a serious offense that can justify dismissal and other legal consequences. The Federal Court's decision in *Mohd Ridzwan* underscores that such misconduct must be firmly addressed by employers and the courts alike to ensure the protection of employees and the maintenance of a safe working environment.

[42] Additionally, sexual harassment is a breach of an employee's contractual and fiduciary obligations, as outlined in the company's Code of Practice on the Prevention and Handling of Sexual Harassment in the Workplace. Employers are not only justified in dismissing employees who engage in such conduct but are legally obligated to do so to prevent further harm to other employees and to protect the company from potential liability.

[43] In conclusion, this court firmly believes that sexual harassment in the workplace is a serious offense that warrants dismissal upon being proven. Courts in Malaysia have consistently upheld this view, ensuring that employers maintain a zero-tolerance policy towards such misconduct. This not only protects the victims but also reinforces the message that inappropriate conduct will not be condoned under any circumstances.

[44] Based on the above reasonings, this court believes there is no need to interfere with the decision of the chairman of the Industrial Court. Gopal Sri Ram, Zainun Ali and Hassan Lah JJCA in the Court of Appeal case of *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237 stated that:

> [18] We, as an appellate court, will not interfere with the decision of the trial judge unless satisfied that his or her findings are plainly wrong. The grounds on which this court may review fact sensitive findings are set out in *Lee Ing Chin v Gan Yook Chin & Anor* [2003] 2 MLJ 97, in a passage that was approved by the Federal Court.

[45] The Court of Appeal case of *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337 also stated that:

> [18] We as an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluating the evidence. It is only in cases where we as an appellate court exercising an appellate jurisdiction are convinced that there was no judicial appreciation of the evidence adduced at the trial by the trier of fact or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord with the probabilities of the case, would we intervene and upset the findings made by the trial judge and substituting therewith with our own findings.

[46] In light of the authorities cited, this court finds it imperative to affirm the findings of the chairman of the Industrial Court in the present case. The principles established in *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237 and *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337 emphasises the deference that appellate courts owe to the factual determinations made by trial judges. As articulated by Gopal Sri Ram, Zainun Ali, and Hassan Lah JJCA, an appellate court will refrain from interfering with a trial judge's findings unless there is clear evidence that such findings are plainly wrong. Moreover, the Court of Appeal in *Setapak Heights* reiterated that it will only intervene in instances where there is a failure to appreciate the evidence or where the trial judge's findings are inconsistent with the probabilities of the case.

[47] This court, after careful consideration, is satisfied that the chairman of the Industrial Court meticulously evaluated the evidence presented and arrived at conclusions that are both reasonable and justified. Therefore, this court fully

concurs with the findings of the Industrial Court and affirms its decision, recognising the importance of preserving the integrity of the initial judgment and the factual assessments that underpin it. Hence, the dismissal of the appellant was with just cause and excuse.

CONCLUSION

[48] This court found that the learned chairman of the Industrial Court had examined and analysed all the relevant evidences and had made correct findings of facts and laws in arriving to his decision. Thus, there was no ground for appellate intervention on the findings made by the Industrial Court. The appellant's appeal is dismissed with cost of RM6,000 is to be paid by the appellant to the respondent.

Appeal dismissed.

Reported by K Selvaraju